Supreme Court, U.S.
FILED

00-424 JUL 10 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

DAVID A. SIMPSON,

Petitioner, Pro se,

v.

COLUMBUS SOUTHERN POWER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID A. SIMPSON
285 Cherrystone Drive North
Gahanna, Ohio 43230
(614) 476-3676

Petitioner, Pro Se

September 2000

88pp

QUESTIONS PRESENTED

1. Whether the petitioner's constitutional right to have a fair trial was violated when the U.S. Court of Appeals for the Sixth Circuit upheld the proceedings of a lower court (the U.S. District Court of the Southern Division of Ohio, Eastern Division) notwithstanding the fact that during the trial, the lower court allowed the attorney for the petitioner to testify against the petitioner prior to the attorney being required to move the court to withdraw as counsel for the petitioner.

2. Whether the petitioner's constitutional right for equal protection under the law was violated, and there was abuse of discretion when the U.S. Court of Appeals for the Sixth Circuit failed to consider evidence presented on appeal which clearly illustrated that the petitioner did not accept a verbal settlement offer, as claimed by the respondents. The decisions of the lower and appellate courts were against the manifest weight of the evidence presented by the petitioner and the respondent's own testimony.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the court of appeals: David A. Simpson and Columbus Southern Power, Inc.

(Rule 29.6, Disclosure, not applicable.)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE (not applicable) ii

TABLE OF AUTHORITIES iv

PROOF OF SERVICE v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

SUMMATION 9

CONCLUSION 11

APPENDIX

DECISION, UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT 1a-7a

DECISION, UNITED STATES COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION 8a-18a

UNITED STATES DISTRICT COURT, TRANSCRIPT OF PROCEEDINGS 19a-60a

UNITED STATES COURT, JUDGMENT IN A CIVIL CASE 61a

CONFIDENTIAL SETTLEMENT AND AGREEMENT 62a-71a

TABLE OF AUTHORITIES

	Page
Cases	
Peak v. First National Bank and Trust Company of Marquette, (1983) 717F.2nd.1016.	6
Statutes and Rules	
Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000(e)	7
Americans With Disabilities Act (ADA), 42 U.S.C. 12101-12213 (1994)	7
Employee Retirement Income Security Act (ERISA) 29 U.S.C. 101-1461 (1994)	8

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

David A. Simpson - PETITIONER

VS.

Columbus Southern Power, Inc. - RESPONDENT(S)

PROOF OF SERVICE

I, David A. Simpson, do swear or declare that on this date, September 16, 2000, as required by Supreme Court Rule 29, I have served the enclosed reformatted PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and address of those served are as follows:

David Alan Laing, Robert Cohn, and Chris Russell
Attorneys for the Respondent
41 South High Street, Suite 2800
Columbus, Ohio 43215-6194

I declare under penalty of perjury that the foregoing is true and correct:

Executed on July 10, 2000 proof of service and original petition for Writ of Certiorari.

Executed on September 16, 2000 proof of service and reformatted Petition for Writ of Certiorari.

David A. Simpson

David A. Simpson
Petitioner, Pro Se

PETITION FOR WRIT OF CERTIORARI

David A. Simpson respectfully petitions this court for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The initial opinion of the United States court of appeals appears in the Appendix to the petition, 1a through 7a, and is unpublished.

The opinion of the United States district court appears at Appendix 8a through 18a to the petition and is unpublished.

JURISDICTION

The decision of the court of appeals that is the subject of this petition was entered April 11, 2000.

No petition for rehearing was timely filed in my case.

STATUTES INVOLVED

The United States Court of Appeals for the Sixth Circuit was presented with a monetary settlement dispute that arose from an employment discrimination case from the lower court (U.S. District Court, Southern District of Ohio, Eastern Division) which brought forth a federal question under Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), et. seq., and Americans With Disabilities Act (ADA), 42 U.S.C. 12101-12213 (1994), and Employee Retirement Income Security Act (ERISA) 29 U.S.C. 101-1461 (1994).

STATEMENT OF THE CASE

A hearing was conducted in U.S. District Court, Southern District of Ohio, Eastern division (Judge Joseph P. Kinneary, Presiding) on November 17, 1998, to rule on a motion filed by the Columbus Southern Power, Inc. (CSP), the former employer of the Petitioner, David A. Simpson. The motion asked the court to enforce a verbal offer of $20,000.00 that CSP attorneys alleged the Petitioner had agreed to accept as a settlement of his lawsuit against CSP, for its unlawful termination of the Petitioner. The settlement negotiations were conducted by the Petitioner's then attorney, Rayl Stepter, during a deposition session in the office of the CSP attorney.

Judge Kinneary decided against the testimony of the Petitioner and ruled in favor of CSP, based on testimony of the latter's witnesses, Attorney Rayl Stepter and the CSP attorney. (*Opinion and Order, U.S. District Court, III Conclusion, Appendix 17a*). It should be emphasized at this point that Attorney Stepter, CSP's main witness who testified against the Petitioner, also was the Petitioner's attorney and the sole participant in has behalf during the entire settlement negotiations that are in question. And as such, Attorney Stepter was the cause of the very issues in dispute regarding this case.

On September 28, 1998, the $20,000.00 offer was relayed to the Petitioner, in person, by Attorney Stepter, during the deposition hearing and after he had conferred with the CSP attorneys in their conference room, without the Petitioner being present.

Attorney Stepter indicated to the Petitioner at that time that this amount would dispose of his wrongful termination claim only, and that sick and disability benefits

which the Petitioner felt were owed to him were not part of this settlement offer. Less than three hours later, on that same day, and after conferring with his wife, this rendition of the settlement offer -- and this rendition only -- is what the Petitioner accepted during a later conversation with Attorney Stepter over the telephone.

The Petitioner's wife advised him to be sure to get this settlement agreement in writing, which he attempted to do by calling Attorney Stepter back. But in trying to verify the terms of the agreement as he understood them to have been -- that is, that the $20,000.00 was not inclusive of the Petitioner's sick and disability claims -- Attorney Stepter then stated that he did not know for sure, and that he would call the CSP attorney for a three-way conversation. Because this differed substantially from what he had previously told the Petitioner and to which the Petitioner he had previously agreed, the Petitioner informed Attorney Stepter at this time that there was no deal.

This rejection of the offer by the Petitioner within hours on the same date that it was proposed, and Attorney Stepter and the CSP attorney's confusion regarding terms of the settlement offer and the Petitioner's rejection, and Attorney Stepter's failure to immediately on that same day inform the CSP attorney that the Petitioner had refused the offer, are all borne out by Attorney Stepter's own admission and testimony, and the testimony of the CSP attorney. (U.S. District Court Transcript of Proceedings, second paragraph, Appendix 49a). Attorney Stepter states that "*...details are a little fuzzy,*" concerning the sick and disability benefits, and the "*...later that day,*" the Petitioner did in fact say "*...there is no deal or something along those lines.*"

And, according to testimony by the CSP attorney, the Petitioner's rejection was not conveyed to him by Attorney

Stepter until "*...several days later*" when "*...we were then informed that Mr. Simpson was no longer interested in settling the case.*" (U.S. District Court Transcript of Proceedings, fourth paragraph, Appendix 23a).

It is obvious that testimony of both CSP witnesses was confusing and in conflict: one witness, Attorney Stepter, alleging that an agreement had been finalized, while at the same time testifying that the Petitioner had rejected the verbal offer by telephone on the very same day, just hours after it had been proposed to him; the other witness, a CSP attorney, claiming that there was an enforceable agreement based on acceptance of a verbal offer, while at the same time testifying that he did not learn that there was no agreement until he was mailing the finalized written version to Attorney Stepter several days after the verbal offer had been made.

Had Attorney Stepter conveyed the Petitioner's rejection when it occurred on the same day, and while negotiations were in progress, the deposition -- and possibly further negotiations -- would have continued and this particular court case would not have arisen.

Instead, the court, by its unfair ruling against the weight of the evidence in the Petitioner's favor, has denied the Petitioner the right to make a decision regarding his own case. The Petitioner has been forced by the court to accept an offer contrived by individuals who were not acting in his best interest, one of whom (Attorney Stepter), was allowed to testify against him, although, he was the sole participant acting in the Petitioner's behalf and upon whom the Petitioner had to rely.

The Petitioner had absolutely no personal communications with the CSP attorney and was not present during the CSP attorney's conference with Attorney Stepter,

so the Petitioner did not know first-hand what settlement terms were offered to Attorney Stepter for presentation to the Petitioner. More importantly, the CSP attorney was not present when Attorney Stepter conveyed the terms of the CSP offer to the Petitioner, so the CSP attorney was unaware of what actually was said, and he therefore was totally incompetent as a witness regarding the settlement offer made to the Petitioner and whether it was accepted or rejected by the Petitioner.

Neither of the litigants in this case ever communicated directly with one another; only Attorney Stepter communicated directly with all the involved parties. Only he and the parties with whom he spoke knew what he actually said to them; and, only they knew what each actually had said to him. But the court relied heavily upon Attorney Stepter's testimony although he, by his own admission and testimony, has admitted confusion, and has stated as fact that the Petitioner rejected an offer over the telephone within hours after he had related it to the Petitioner in person. (U.S. District Court transcript of proceedings, Appendix 49a, second paragraph)

Under these circumstances and the testimony presented, it was highly inappropriate that the court accepted the claims and testimony of Attorney Stepter and the CSP attorney as overriding the Petitioner's assertion that there was no acceptance by him of a settlement offer made by CSP.

REASONS FOR GRANTING THE PETITION

The District and Appellate Courts erred in ruling against the Petitioner, based upon mere verbal conversations between the parties during an impromptu period of negotiating which occurred at a deposition hearing. There is no reliable evidence in the record to reflect a concrete

acceptance, agreement or settlement by the parties. Accordingly, the said ruling against the Petitioner represents an abuse of discretion.

In determining whether the courts entered a proper judgment relative to the Petitioner's case, it is necessary for the appeals court to review the record of proceedings in this matter to determine whether the trial court abused its discretion in concluding that the parties had indeed settled all claims and the settlement was enforceable. Peak v. First National Bank and Trust Company of Marquette, (1983) 717 F. 2nd. 1016.

Such abuse of discretion occurred in the lower court, and was upheld on appeal, when it ruled against the manifest weight of the evidence presented. The trial court record is reflective of the fact that no signed agreement ever existed between the parties, and that the Petitioner never verbally agreed to settle in the presence of the opposing counsel. It was left up to the Petitioner's attorney, Rayl Stepter, who was an opposing witness at the trial, to convey the offers, acceptances and rejections of the parties -- and as the testimony indicates, he was admittedly confused and did so without the parties being in the presence of each other. He admitted in testimony that he was well aware of the Petitioner's dissatisfaction with the CSP offer, while negotiations were still in progress; however, according to testimony of the CSP attorney, Mr. Stepter did not inform him of the Petitioner's reluctance until several days later when the so called agreement was being reduced to writing.

The record clearly reflects that the dispute centers solely upon the acceptance or rejection of a settlement amount, $20,000.00, and whether that amount was in settlement of the Petitioner's wrongful termination claim only. The CSP attorney and his witness, Attorney Stepter, claim that the Petitioner reneged on a settled agreement,

when in reality, there was an error in communication as to what was being offered and what the Petitioner was willing to accept. This is a difference in understanding between the parties during the negotiation process -- not a withdrawal by the Petitioner from a settled agreement. Testimony presented during the trial clearly established that these differences, which had precipitated the Petitioner's rejection of the offer, where known by Attorney Stepter prior to the agreement being reduced to writing for perusal, approval, and signing by the parties.

Accordingly, there was no meeting of the minds, no verbal agreement; the parties were, by virtue of the testimony given, undeniably in dispute prior to the drafting of a settlement agreement or a reduction of its terms to writing. This problem herein was created by Attorney Stepter himself, who was a witness in opposition to the Petitioner whom he represented; and, who failed to deal with this obvious dispute in a responsible and professional manner.

The appellate court should not have approved the lower court's ruling that there had been a settlement when no such verbal agreement had ever been reached or reduced to writing. The courts were in error and abused their discretion when they ruled against the Petitioner based on their strict reliance upon witness Stepter's version of the turn of events under these unique and questionable circumstances, and in light of his admitted conflicting and confusing testimony.

The effect of the court's ruling against the Petitioner is far-reaching and of national significance concerning the laws of our nation, and the protection of workers' rights against wrongful terminations, and the deprivation of disabled employee benefits. [Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), et. seq., and Americans With Disabilities Act (ADA), 41 U.S.C. 12101-12213

(1994), and Employee Retirement Income Security Act (ERISA) 29 U.S.C. 101-1461 (1994)].

The ruling against the Petitioner deprives him of the right to pursue his legal action against CSP, his former employer, based on the merits of his case, which are predicated on the above-cited laws intended to protect his ability to earn a living and support his family. By force-feeding the alleged verbal agreement upon the Petitioner, based solely on a mere monetary dispute during negotiations, the courts are requiring that the Petitioner accept and sign a ten-page written settlement agreement containing terms and conditions not proposed or discussed with him for his acceptance or rejection during that period of negotiation (U.S. District Court, Southern District of Ohio, Eastern Division, Judgment In A Civil Case (Appendix 61a), and attached Confidential Settlement Agreement, and Stipulation of Dismissal, Appendix 62a through 71a).

Even had the Petitioner accepted the $20,000.00 offer, as the CSP attorney claims, there is certainly nothing in the record that indicates the Petitioner also accepted the myriad of additional terms and conditions contained in the agreement reduced to writing which the court ordered the Petitioner to sign, and which was precipitated by the court's mere decision, and approval at the appellate level, that a valid $20,000.00 offer and acceptance existed.

It should be emphasized at this point that Attorney Stepter, the CSP key witness who also was acting as the Petitioner's attorney prior to this lawsuit, did not, prior to appearing before the trial court and offering opposing testimony as a witness, move the court to withdraw as counsel for the Petitioner (*Opinion and Order, United States District Court, Southern District of Ohio, Appendix, first paragraph, 14a*). Attorney Stepter did not advise the

Petitioner that he would be appearing against him in the upcoming hearing but in fact indicated to him that he would not be appearing to represent the Petitioner and he should retain other counsel.

After his prejudicial testimony, Attorney Stepter then asked the court to go off the record to discuss waiving the attorney/client privilege (*U.S. District Court Transcript of Proceedings, first full paragraph, Appendix 44a*). Basing the decision so heavily on the testimony of Attorney Stepter whose role in this case was at best dubious, ambivalent, and indeterminable, is considered by the Petitioner herein to have been highly inappropriate.

Attorney Stepter did not act in the best interest of the Petitioner because his attitude throughout was not to try the Petitioner's case on its merits, but to spend as little time as possible, quickly settle the case, and collect his fee. This might be appropriate if it is the understanding between him and his client and the latter agrees with the settlement amount. But to be in disagreement with his client's wishes and carry the elements of this dispute into the court as a witness against his client, was unconscionable. And to be allowed by the court to testify thereto without having prior moved the court to withdraw as counsel for the Petitioner, and for the court to rely so heavily on that testimony as being credible in the light of the Petitioner's evidence to the contrary as illustrated herein, was a clear abuse of discretion by the court against the Petitioner.

SUMMATION

I

Testimony clearly indicates that the CSP's key witness, Attorney Stepter, withheld from the CSP attorney information that the Petitioner had rejected the CSP offer of $20,000.00 to settle his case. It is apparent that Attorney

Stepter was acting in his own behalf and not that of the Petitioner whom he represented at the time. But the courts, by their ruling against the Petitioner, have punished him by placing his case in the hands of a key witness for the opposition, who was in fact the Petitioner's own attorney, and they have denied the Petitioner the pursuit of his own case on its merits, because the Petitioner's attorney failed to properly communicate the Petitioner's wishes to opposing counsel.

II

The Petitioner's refusal to accept the $20,000.00 offer was not a withdrawal from a settlement agreement -- it was the clearing up of inaccurate information the Petitioner received from Attorney Stepter while negotiations were still in progress. There was never an agreed-upon settlement, verbal or otherwise, against which the Petitioner could have reneged.

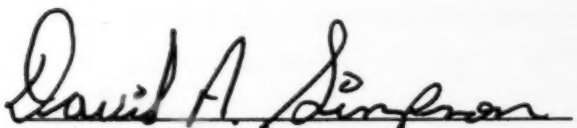
III

The court ordered the Petitioner to sign a written settlement agreement which was based on its ruling against the Petitioner that he had accepted a $20,000.00 offer from CSP. However, there are terms and conditions, other than the money issue, contained in that agreement which the Petitioner had not been given the opportunity to consider for acceptance or rejection.

CONCLUSION

In consideration of the above pleadings, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,



David A. Simpson, *Pro se*

Date: July 10, 2000 (originally submitted)

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

DAVID A. SIMPSON
Plaintiff-Appellee,

v.

COLUMBUS SOUTHERN POWER CO.
Defendant-Appellant
No. 99-3250.

April 11, 2000

Before BATCHELDER and DAUGHTREY, Circuit Judges and STEEH, District Judge*.

On appeal from the United States District Court for the Southern District of Ohio.

PER CURIUM. The district court enforced a settlement agreement between plaintiff, David A. Simpson, and his employer, Columbus Southern Power Company. Simpson alleges on appeal that the district court committed clear error in finding that Simpson authorized his counsel to enter an oral agreement to settle all the claims between the parties. We find that Simpson's notice of appeal is untimely. Even if the notice was timely, we find no error and affirm.

---

*The Hon. George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

FACTUAL AND PROCEDURAL BACKGROUND

Simpson had been employed by defendant for twenty-two years as an hourly truck driver when he was terminated on September 3, 1997. Simpson had been injured on the job in 1994 and was laid off in 1995 due to his injuries. Thereafter, Simpson received long-term disability payments until his termination.

Simpson filed this federal lawsuit on August 20, 1997 alleging that defendant violated his rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq*. and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq*., and claiming defendant intentionally caused him to suffer emotional distress. The district court dismissed Simpson's emotional distress claim on April 9, 1998. Until this point in the proceedings, Simpson was a *pro se* litigant. On July 7, 1998, attorney Rayl L. Stepter filed an appearance on behalf of plaintiff.

The case proceeded on Simpson's ADA and ERISA claims, and the parties began to discuss settlement. Defendant noticed Simpson's deposition for September 28, 1998 at the office of defendant's counsel, David Laing. On that morning, prior to commencing the deposition, defendant offered to settle all of plaintiff's claims for $18,500. Simpson countered with an offer to settle for $21,500 contingent upon confirmation that another former employee, Paul Benson, who had been laid off simultaneously with plaintiff, had not received a severance or other lump sum payment. Defendant countered plaintiff's demand by offering to settle for $20,000 with the same contingency regarding Paul Benson. To meet the contingency, Mr. Laing agreed to obtain Benson's 1995 payroll records and to make Benson available by telephone for questioning.

Mr. Stepter met briefly with plaintiff to communicate the $20,000 offer, and then both men left Laing's office to think it over. Simpson told Stepter he wanted to discuss the offer with his wife. Meanwhile, Laing faxed Benson's payroll records to Stepter. Laing also called Stepter to explain the pay codes in the records. At the time of Laing's call, Stepter had not heard from Simpson as to whether he wanted to accept the offer.

At 1:00 p.m. the same day, Laing called Stepter to inquire about the offer. Stepter had still not heard from plaintiff. Laing told Stepter that if Simpson did not accept the offer, his deposition would reconvene at 1:30 p.m. Stepter did talk with plaintiff at around 1:15 p.m. During the conversation, Stepter explained to plaintiff that the $20,000 offer was for settlement of all claims. Simpson authorized Stepter to accept the defendant's offer. Stepter called Laing to communicate plaintiff's acceptance. Later the same day, Stepter questioned Benson to confirm that he had not received a severance or lump sum payment from defendant. At this time, Stepter believed the dispute had been completely resolved.

After Stepter communicated plaintiff's acceptance of the $20,000 settlement offer, Simpson called Stepter to inquire whether the $20,000 included his claim for continued long-term disability. When Stepter informed him the settlement was for all claims, Simpson refused to uphold the settlement.

Simpson obtained separate counsel, Stanlee E. Culbreath, and the court conducted its evidentiary hearing on November 17, 1998, granting defendant's motion to enforce the settlement agreement. The court expressly found Simpson's testimony that he did not understand that the settlement agreement's terms included settlement of his

entire claim "not credible." The court instead credited Stepter's testimony that plaintiff was "fully informed" of the offer's terms and he expressly authorized Stepter to communicate his acceptance. On January 12, 1999, the court entered its order enforcing the parties' settlement agreement and a judgment dismissing the case. A copy of the settlement agreement was attached to, and made a part of, the judgment.

Subsequently, on January 21, 1999, attorney Stepter filed a Rule 59(e) motion to amend the judgment to permit a separate disbursal of attorney's fees pursuant to the settlement agreement. The settlement agreement provided that the settlement amount be paid jointly to Simpson and Stepter. Stepter was concerned that Simpson would not endorse the settlement check and that his attorney's fees would not be paid. The court denied Stepter's motion, finding that as a nonparty he did not have standing to bring a Rule 59 motion to amend the judgment. The court entered its order denying Stepter's motion to amend, as well as a separate judgment, on February 2, 1999. Plaintiff filed his Notice of Appeal in this case on February 23, 1999.

DISCUSSION

A judgment is to enter from "any order from which an appeal lies." Fed. R. Civ. P. 54(a), *Green v. Nevers.* 196 F.3d 627, 630-31 (6th Cir. 1999). In this case there was occasion to enter two judgments. Both were appealable. Federal Rule of Appellate Procedure 4(a)(1)(A) provides that "the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." There is an exception to this general rule in certain cases where a post-judgment motion has been filed. See, Fed. R. App. P. 4(a)(4)(A). For example, the 30-day appeal period will be tolled if a party files a motion to amend the judgment under Rule 59. Fed. R. App. P. 4(a)(4)(A)(iv).

Defendant alleges that Mr. Stepter's Rule 59 motion to amend the judgment does not toll the appeals period because Mr. Stepter is not a party to the action. In fact, the very reason the district court denied Stepter's Rule 59 motion was because he was not a party and he lacked standing to bring such a motion. While the judgment entered on February 2. 1999 was an appealable judgment. it does not form the basis of plaintiff's appeal. Rather. plaintiff's appeal relates to the January 12, 1999 judgment, which was also an appealable judgment, and therefore the notice of appeal must have been filed within 30 days of January 12. 1999.

The requirement of a timely notice of appeal is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (citing *Browder v. Director. Dept. of Corrections of Ill.*, 434 U. S. 257, 264 (1978)). Plaintiff's notice of appeal was not filed within the requisite time period, and therefore, this court does not have appellate jurisdiction over the appeal.

Even if plaintiff's notice of appeal had been timely filed, his appeal would still fail on the merits. A trial court has "inherent authority to summarily enforce settlement agreements entered into by parties litigant in a pending case." *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621 (6th Cir. 1973) (quoting *Cia Anon Venezolana* De *Navegacion v. Harris*, 374 F. 2d 33, 36 (5th Cir. 1967)). The district court complied with the *law* of this circuit, which requires an evidentiary hearing in order for the court to properly judge the credibility of the witnesses and provide an opportunity for their cross-examination in cases involving an oral settlement not made in the presence of the court. *Id.* at 622.

The disputed issues at the evidentiary hearing were whether Stepter obtained plaintiff's authority to accept the settlement offer, and, if so, whether plaintiff understood that the offer was to settle all claims. Much of the testimony centered on what occurred between 1:00 p.m. and 1:20 p.m.

on September 28, 1998. Simpson's argument is that Stepter's direct examination does not establish that he spoke to plaintiff between 1:00 p.m. and 1:20 p m. However, Stepter did testify on direct examination that Simpson had authorized him to communicate acceptance of defendant's offer. In addition, on cross-examination by Mr. Culbreath, Stepter indicated that he spoke to plaintiff on the telephone and that plaintiff had accepted the settlement.[1]

---

[1][Culbreath] At what point in time did Mr. Simpson accept this settlement? I am speaking on the point when he had left and he was going to go discuss this with his wife.

[Stepter] I remember a telephone call by Mr. Simpson that I had after we had both left Mr. Laing's office, and he indicated that he had accepted the settlement, contingent upon confirmation of Mr. Benson's benefit status.

[Culbreath] So, you are saying at some point or at some period of time the same day, Mr. Simpson had called you back, but you had already relayed that he had accepted the offer, is that what you are -- is that what you are telling the Court

[Stepter] As I recall the sequence of events, Mr. Simpson called me between -- I don't know - maybe one or 1 30.

[Culbreath] Okay That would be the 1:15 call?

[Stepter] Yeah, yeah.

[Culbreath] All right.

[Stepter] And he stated that he accepted the offer. Okay? I then called Mr. Laing and told him that the offer was accepted, contingent upon confirming the information about Mr. Benson.

There is ample support in the record for the trial court's conclusion that plaintiff spoke to Stepter and expressly authorized him to accept the defendant's offer. The district court's determination that Simpson understood the terms of the settlement is supported by Stepter's testimony that "at the time I spoke to Mr. Laing and conveyed our acceptance of a settlement offer, that I conveyed to Mr. Simpson that that was a lump sum and dispositive of all the claims."

Defendant's motion for sanctions under Fed. R. App. P. 38 and 28 U.S.C. § 1912 is DENIED. While plaintiff's appeal has been found to lack merit, it is not wholly frivolous so as to warrant sanctions.

CONCLUSION

For the reasons set out above, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

DAVID A. SIMPSON,
Plaintiff,
v.
COLUMBUS SOUTHERN POWER CO.
Defendant.
No. C-2-97-938

November 24, 1998

OPINION AND ORDER

This matter is before the Court on Defendant's motion for summary judgment to enforce the settlement agreement. The relevant dispute in this case involves a question of whether the parties entered into a settlement agreement on or about September 28, 1998. On November 17, 1998, this Court conducted an evidentiary hearing on the matter. Because a motion for summary judgment is an inappropriate mechanism to make the necessary determinations, the Court **DENIES** Defendant's motion for summary judgment but **CONVERTS** Defendant's motion into a motion to enforce the settlement agreement.

After consideration of the evidence and the arguments of counsel and for the reasons set forth below, the Court **FINDS** that the parties entered into a settlement agreement on September 28, 1998. Further, the Court **FINDS** that the terms of that settlement agreement are set forth in Defendant's Exhibit C offered by Defendant at the evidentiary hearing. Accordingly, the Court **ORDERS** that the settlement agreement contained in Defendant's Exhibit C

be properly filed, executed and carried out by the parties. The Court **GRANTS** Defendant's motion to enforce the settlement agreement and **DISMISSES** Plaintiff's remaining claims **WITH PREJUDICE.** The Court **DENIES** Defendant's motion for costs. Instead, the Court **ORDERS** the parties to pay their respective costs.

I. BACKGROUND

Plaintiff, David A. Simpson, worked as an hourly employee for Columbus Southern Power Company ("CSP") from February 4, 1975 to September 3, 1997. In 1994, Plaintiff suffered a back and neck injury after an on-the-job accident. Later in 1994, Plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission and Equal Employment Opportunities Commission alleging that Defendant discriminated against him because of his back injury. In 1995, Defendant laid off Plaintiff from work. Sometime after his layoff, Plaintiff applied for and received long-term disability ("LTD") payments from Defendant's disability plan administered by an outside insurance company. In 1997, CSP terminated Plaintiff's employment.

On August 20, 1997, Plaintiff, proceeding pro se, filed a five-count Complaint in this Court against Defendant. In his Complaint, Plaintiff alleges that Defendant violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1994), and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 - 1461 (1994). Originally, Simpson also brought a claim for infliction of emotional distress against Defendant. Shortly, after Plaintiff filed his Complaint, Defendant terminated Plaintiff's employment and ended Plaintiff's LTD payments.

On April 8, 1998, this Court dismissed a portion of Plaintiff's Complaint, including the claim for infliction of

emotional distress. (Doc. # 21.) On April 15, 1998, this Court scheduled a preliminary pretrial conference for May 5, 1998. (Doc. # 23.) On May 5, 1998, Rayl Stepter appeared with Plaintiff at the preliminary pretrial conference and indicated to Magistrate Judge Kemp that shortly he would be entering his appearance as counsel for Plaintiff. (Doc. # 25.) On July 7, 1998, Rayl L. Stepter filed his notice of appearance as counsel Plaintiff. (Doc. # 30.)

On July 10, 1998 and on September 2, 1998, Plaintiff amended his Complaint. Plaintiff's Second Amended Complaint alleges that Defendant discriminated against Plaintiff and retaliated against him in violation of the ADA. Plaintiff's Second Amended Complaint further alleges that Defendant violated ERISA and terminated him in retaliation to prevent him from receiving his pension benefits.

On August 11, 1998, this Court referred this case to settlement week. The Court set the matter for mediation on September 23, 1998. On September 14, 1998, Defendant filed a motion to cancel mediation because the parties were not close to settlement. Apparently, Defendant received a settlement demand from Plaintiff that was not close to Defendant's proposed offer. Shortly thereafter, Magistrate Judge Kemp conducted a telephone conference to see whether a settlement conference would be helpful. During the telephone conference, Plaintiff's attorney, Rayl Stepter, indicated that the settlement conference should not be canceled. Accordingly, the parties appeared at the September 23, 1998 mediation conference but were unable to settle this matter.

On September 15, 1998, Defendant filed a notice of deposition to depose Plaintiff on September 28, 1998. On September 28, 1998. Plaintiff and Mr. Stepter arrived at the offices of Defendant's counsel, David A. Laing, for Plaintiff's

deposition. Before the deposition began, however, the parties engaged in more settlement discussions.

First, Mr. Laing, on behalf of CSP, offered $18,500 to settle the case. The settlement was to be a settlement of all of Plaintiff's claims against Defendant, including a settlement of any LTD claims made by Plaintiff. Mr. Stepter then made a counter-offer seeking $21,500 and a confirmation from Defendant that another former CSP employee, Paul Benson, did not receive some form of severance payoff from CSP. Apparently, Plaintiff believed that, upon severance from CSP, Mr. Benson received a larger benefits package than Plaintiff received. Mr. Laing, upon hearing the demand of $21,500, made a new offer of $20,000 to settle the case. In addition, Mr. Laing indicated that Defendant would provide Mr. Stepter with a copy of Mr. Benson's payroll records to prove that Mr. Benson had not received greater benefits than Plaintiff received. At that point, Mr. Stepter spoke with Plaintiff and told him of the offer "on the table."

After hearing Defendant's offer, Plaintiff decided that he needed to consult with his wife before accepting any settlement. Plaintiff thus left Mr. Laing's office. Mr. Stepter left shortly thereafter.

Next, Mr. Laing contacted personnel with Defendant and asked for Mr. Benson's payroll forms. Later that morning, personnel with Defendant faxed the relevant forms to Mr. Laing. Mr. Laing, in turn, faxed the forms to Mr. Stepter. In addition, Mr. Laing deciphered the notations contained in the payroll forms to Mr. Stepter. Mr. Laing indicated to Mr. Stepter that the notations showed that Mr. Benson did not receive any greater benefits than Plaintiff received.

At around 1:00 p.m. that afternoon, Mr. Laing initiated a phone call to Mr. Stepter. Mr. Laing asked Mr. Stepter whether Plaintiff accepted the settlement offer. Mr. Stepter indicated that he had not heard from Plaintiff. Mr. Laing told Mr. Stepter that if Plaintiff did not accept the settlement offer, Plaintiff would need to be deposed at around 1:30 p.m. that afternoon. Mr. Stepter indicated that he would contact Plaintiff.

Mr. Stepter next called Plaintiff. Mr. Stepter testified that Plaintiff then authorized Mr. Stepter to accept the settlement offer, contingent upon confirmation that Mr. Benson did not receive any greater benefits than Plaintiff received. At that point, at around 1:15 p.m., Mr. Stepter called Mr. Laing and told Mr. Laing that Plaintiff accepted the offer contingent upon confirmation that Mr. Benson had not received any greater benefits than Plaintiff. Mr. Laing understood that Plaintiff's acceptance of the offer was only contingent upon the parties speaking with Mr. Benson personally.

Later that afternoon, Mr. Laing made a conference telephone call with Mr. Benson and Mr. Stepter. During this conference call, Mr. Benson indicated that he had not received any additional benefits other than a sick pay allowance. Further, Mr. Benson indicated that he applied for unemployment benefits and had these unemployment benefits offset from other severance benefits offered by Defendant. Finally, Mr. Benson indicated that Plaintiff questioned him about the same topics at some point either that day or the day before. After this conversation with Mr. Benson, Mr. Stepter believed that the contingency was satisfied and the parties had a settlement agreement. Thus, after ending their discussions with Mr. Benson, the parties had an understanding that they settled the case.

To memorialize the agreement, that afternoon, Mr. Laing sent a letter via facsimile to Mr. Stepter reflecting the key terms of the settlement. (Def's Ex. B.) Mr. Stepter agrees that this letter contains the key terms of the settlement.

Three days later, on October 1, 1998, Mr. Laing sent Mr. Stepter a draft of the settlement agreement. After receiving the draft, Mr. Stepter contacted Plaintiff. At that point, Plaintiff indicated that he was no longer interested in settlement under the conditions stated in the draft agreement. Instead, Plaintiff wanted to receive the $20,000 plus additional LTD benefits. In fact, Plaintiff was not interested in settlement without reinstatement to his former position.[1]

Armed with the information that Plaintiff no longer wanted to settle the case, Mr. Stepter informed Mr. Laing that Plaintiff did not want to settle. Mr. Laing countered by declaring to Mr. Stepter that the parties had a deal and he would go to Court, if necessary, to enforce that agreement.

On October 8, 1998, Mr. Laing phoned Mr. Stepter to ascertain whether Plaintiff would agree to the settlement. Mr. Stepter indicated that Plaintiff would not agree. That same day, Defendant filed a motion for summary judgment. Plaintiff has never filed a response to this motion. In addition, on October 9, 1998, Defendant served on Plaintiff nine requests for admission and two interrogatories. To date, Plaintiff has not responded to these requests or interrogatories.

---

[1] At the evidentiary hearing, Plaintiff indicated that he believed the settlement offer by Defendant was only to dispose of his federal claims and not to settle a dispute involving his LTD benefits. As such, Plaintiffs indicated that he did not understand that the terms of the agreement would be "global" and extinguish each and every claim against Defendant.

At some point after October 1, 1998, Plaintiff decided to terminate his attorney-client relationship with Mr. Stepter. At the time of the evidentiary hearing before this Court on November 17, 1998, Mr. Stan Culbreath represented Plaintiff, although Mr. Culbreath has not, to date, entered his notice of appearance on behalf of Plaintiff, nor has Mr. Stepter entered his motion to withdraw as counsel for Plaintiff.

On November 17, 1998, this Court conducted an evidentiary hearing. At the hearing, the Court heard testimony from Mr. Stepter and from Plaintiff. The Court conducted the hearing to determine whether the parties entered into a settlement agreement and, if so, what the terms of the settlement agreement are. The Court examines these issues below.

II. DISCUSSION

A. Motion for Summary Judgment Is Not Proper

Although Sixth Circuit case law on this point is somewhat murky, the Court believes that a motion for summary judgment is an inappropriate mechanism to decide the issues raised by Defendant because a substantial factual dispute exists. Cf. Kukla v. National Distillers Prods. Co., 483 F.2d 619, 621 (6th Cir. 1973); Worthy v. McKesson Corp., 756 F.2d 1370, 1372 (6th Cir. 1985). Instead, the Court believes that in order to make the factual determinations necessary to decide the issues in this case, the Court needed to conduct an evidentiary hearing. A motion for summary judgment does not allow the Court to weigh issues of fact; an evidentiary hearing allows the Court to consider the contested issues of fact.

Accordingly, this Court conducted an evidentiary hearing under its "inherent power to summarily enforce settlement agreements entered into by parties litigant in a pending case." Id. (quoting Cia Anon Venezolana De Navegacion v. Harris, 374 F.2d 33, 36 (5th Cir. 1967)).[2] Therefore, the Court finds that Defendant's motion for summary judgment should not be granted. The Court **DENIES** Defendant's motion for summary judgment but **CONVERTS** Defendant's motion into a motion to enforce the settlement agreement.

B. Analysis

Having clarified the record and having converted Defendants' motion into a motion to enforce the settlement agreement, the Court turns to the substantive arguments of the parties. Defendant argues that the parties entered a settlement agreement sometime during the afternoon of September 28, 1998. Plaintiff argues that there was no "meeting of the minds" about the terms of an alleged settlement agreement. Indeed, Plaintiff claims that he only wanted to settle his federal claims but reserved the right to receive his LTD benefits. After a careful review of the evidence put before the Court, the Court agrees with Defendant that the parties reached a settlement agreement.

---

[2] The power of the Court to enter a judgment enforcing a settlement agreement has its basis in the policy favoring the settlement of disputes and the avoidance of wasting the Court's judicial resources. See Kulka, 483 F.2d at 621 (citing cases). "To effectuate this policy, the power of a trial court to enforce a settlement agreement has been upheld even where the agreement has not been arrived at in the presence of the court nor reduced to writing." Id. (citations omitted)

An oral agreement to settle a claim is enforceable under federal (and Ohio) law. See Kukla, 483 F.2d at 621; Bostick Foundry Co. v Lindberg, A Div. of Solo Basic Indus., Inc., 797 F.2d 280, 282-83 (6th Cir. 1986); Wyche v. Proctor & Gamble, 772 F. Supp. 982, 984 (S.D. Ohio 1990). Further, a plaintiff who knowingly and voluntarily agrees to settle his claims is bound by his agreement. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15 (1974); Wyche, 772 F. Supp. at 984.

In this case, the Court finds that Plaintiff knowingly and voluntarily entered into a settlement agreement. Plaintiff is bound by that agreement. Like the Wyche case, the parties reached an oral decision to settle this case after preliminary discussions and negotiations. Wyche, 772 F. Supp. at 984. Mr. Stepter testified that he informed his client of the nature of the "global" settlement involving any and all claims that Plaintiff had against Defendant. Indeed, on cross-examination, Mr. Stepter testified that he informed Plaintiff that the settlement was a lump-sum payment, dispositive of all claims including any claims relating to LTD payments. Knowing the substance of the offer on the table, Plaintiff asked for time to confer with his wife. After he apparently discussed the matter with his wife, Plaintiff then told Mr. Stepter that he accepted the offer, contingent upon an understanding that Mr. Benson had not received any greater benefits than Plaintiff. Mr. Stepter, as Plaintiff's agent with authority to make an agreement, called Mr. Laing and indicated that the two parties had a deal, contingent upon the information about Mr. Benson. Once Defendant satisfied that contingency by giving Mr. Stepter the payroll forms from Mr. Benson and by allowing Mr. Stepter to speak to Mr. Benson about his benefits, the parties entered into a settlement agreement. Furthermore, the Court finds that Mr. Stepter fully informed Plaintiff of the terms of the settlement. The Court finds Plaintiff's testimony that he did not

understand that terms of the settlement agreement included settlement of his claims for LTD benefits not credible. Accordingly, the Court **FINDS** that the parties came to a settlement agreement on the afternoon of September 28, 1998.

In making a settlement agreement, the parties agreed to the following terms: First, the parties agreed that Plaintiff would receive $20,000 as a global settlement of any and all claims that he had against Defendant, including a settlement of any LTD benefits that Plaintiff believed he was owed by Defendant. Second, the parties agreed that upon execution of the settlement agreement, Plaintiff would dismiss his Complaint in this Court with prejudice. Third, the parties agreed that Plaintiff's agreement with Defendant was subject to a confidentiality agreement between the parties. Because Mr. Stepter testified that these were the terms of the settlement agreement between the parties and because the Court **FINDS that** Defendant's proposed settlement agreement, (Def.'s Ex. C),[3] incorporates those terms, the Court **ORDERS** that Defendant's proposed settlement agreement be properly filed, executed and carried out by the parties. Accordingly, the Court **GRANTS** Defendant's motion to enforce the settlement agreement. The Court **DISMISSES** Plaintiff's claims **WITH PREJUDICE.**

III. CONCLUSION

Upon consideration and being duly advised, the Court **DENIES** Defendant's motion for summary judgment but **CONVERTS** Defendant's motion into a motion to enforce the settlement agreement. Further, after consideration of the

[3] Although the Court never formally allowed Defendant an opportunity to move its exhibits into evidence, the Court sua sponte **MOVES** Defendant's exhibits into evidence and **ADMITS** those four exhibits, Defendant's Exhibits A through D, over any of Plaintiff's possible objections.

testimony presented at the evidentiary hearing held on November 17, 1998, the Court **FINDS** that the parties entered into a settlement agreement on the afternoon of September 28, 1998. In addition, the Court **FINDS** that the terms of that settlement agreement are set forth in Defendant's Exhibit C offered at the evidentiary hearing conducted on November 17, 1998. Accordingly, the Court **ORDERS** that the settlement agreement contained in Defendant's Exhibit C be properly filed, executed and carried out by the parties. The Court **GRANTS** Defendant's motion to enforce the settlement agreement and **DISMISSES** Plaintiff's remaining claims **WITH PREJUDICE**. The Court **DENIES** Defendant's motion for costs. Instead, the Court **ORDERS** the parties to pay their respective costs. All other motions are **MOOT**. This case is **TERMINATED**.

IT IS SO ORDERED.

"s/Joseph P. Kinneary"
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

DAVID A. SIMPSON,
Plaintiff,

v.

COLUMBUS SOUTHERN POWER COMPANY,
Defendant.
No. C-2-97-938

November 17, 1998

SETTLEMENT HEARING

TRANSCRIPT OF PROCEEDINGS

Before the honorable JOSEPH P. KINNEARY, United States District Court, sitting at Columbus, Ohio, on Tuesday, November 17, 1998.

Appearances:

Mr. Stanlee E. Culbreath on behalf of the Plaintiff,

Messrs. David A. Laing, Robert Cohn and Chris Russell on behalf of the Defendant.

Georgina L. Wells, Federal Court Reporter, computerized transcription.

Georgina L. Wells, federal court reporter, computerized transcription.

GEORGINA L. WELLS, RMR
Judge George C. Smith's Chambers
85 Marconi Boulevard, Suite 101
Columbus, Ohio 43215
(614) 719-3225

December 8, 1998

United States District Court
Southern District of Ohio
Eastern Division

IN RE: David A. Simpson v.
Columbus Southern Power Company,
C-2-97-938

SERVICES RENDERED TO:

MR. DAVID A. SIMPSON
285 Cherrystone Dr. N.
Gahanna, OH 43230
(614) 476-3676

For copy of proceedings before Honorable Joseph P. Kinneary, Judge, sitting at Columbus, Ohio.

For settlement hearing on Tuesday, November 17, 1998:

39 pages @ $3.00 per page	$115.00
Deposit	115.00
Balance	$0.00

NOTE: Pursuant to Title 28, USC Section 753(f), upon receipt of amount due, transcript will be made available for pickup at Room 101, unless other arrangements have been made. Call ahead for time confirmation.

I certify that the transcript fees charged and page format used comply with the requirements of this court and the Judicial Conference of the United States.

"s/Georgina L. Wells"
Georgina L. Wells, RMR
Thank You.

Tuesday Morning Session,
November 17, 1998.

THE COURT: The Clerk will call the case.

THE CLERK: The Court calls civil number C-2-97-938, David A. Simpson v. Columbus Southern Power Company.

THE COURT: The record will show that this matter is before the Court as to determine whether or not there has been a settlement of this case previous to this date. The Court has before it the defendant's motion for summary judgment to enforce this settlement agreement which was reached before this date.

The Court will now receive, if you car to make it, a statement by the defendant. Let's see, who will speak for the defendant?

MR. LAING: Your Honor, I will. I am David Laing, L-A-I-N-G, trial attorney for the defendant.

THE COURT: Come up, Mr. Laing. You may make a statement.

MR. LAING: Yes, Your Honor. I have filed a motion to enforce the settlement agreement on behalf of Columbus Southern Power.

THE COURT: Go ahead.

MR. LAING: Okay. I will, at least advise the Court that there has been no memorandum opposing the motion filed today.

THE COURT: I am having difficulty with this. Come up here. No, right there. Stay on the edge there.

MR. LAING: Your Honor, I am David Laing, trial attorney for Columbus Southern Power, and I am the attorney who filed the motion to enforce the settlement agreement on behalf of the company. There has not been an opposing memorandum filed in opposition to that motion.

The basis of our motion, Your Honor, is that on September 28th, 1998, prior to the deposition of Mr. Simpson in this case, the parties agreed to resolve this matter for a $20,000 payment in exchange for release of all claims. And there was one contingency to that settlement, that the company provide Mr. Simpson and his attorney confirmation that another individual laid off at the same time as Mr. Simpson did not receive some type of severance benefit and that was provided.

Therefore, the only contingency to the settlement was satisfied by the company. There was an agreement and a meeting of the minds that this matter had been resolved for $20,000 in exchange for a release of all claims. When a settlement agreement was forwarded to Mr. Simpson's attorney several days later, we were then informed that Mr. Simpson was no longer interested in settling the case.

THE COURT: The Court assumes that you will present testimony, a statement from the counsel involved in the settlement?

MR. LAING: Yes, Your Honor.

THE COURT: Who are you going to call first?

MR. LAING: Mr. Stepter, the trial attorney for David Simpson.

THE COURT: All right. Call him.

MR. LAING: We would call Mr. Stepter at this time.

THE COURT: Okay.

MR. LAING: Would you like me to remain up here for questioning?

THE COURT: Yes. Please be seated in the witness chair.

RAYL STEPTER

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LAING:

MR. LAING: Your Honor, I have four exhibits. Would you like a set for you?

THE COURT: What did you say?

MR. LAING: Would you like a set of the exhibits for your personal review?

THE COURT: Yes, yes. All right. Go ahead.

Q. Would you please state your name?

A. Rayl Stepter.

Q. Okay. Mr. Stepter --

THE COURT: Can that be pulled out a little bit?

THE CLERK: No, Judge.

THE COURT: That's permanent there?

THE CLERK: Yes.

THE COURT: Okay. Go ahead.

Q. Okay. Mr. Stepter, you are trial attorney for the plaintiff David Simpson in this case?

A. Yes.

Q. Okay. You have been -

THE COURT: You were, but you are not now? You were the trial attorney?

THE WITNESS: That's true, Your Honor, at the time of the incident in question I was.

Q. Okay. At least, you have been trial attorney from approximately July of this year through October 1st of this year; is that correct?

A. I believe that's correct.

Q. At least, in the settlement discussions involved in this case you were the trial attorney for Mr. Simpson; is that right?

A. Yes. At the time of those settlement negotiations, I was Mr. Simpson's trial attorney.

Q. And Mr. Stepter, throughout the course of this case, even before becoming his trial attorney, you have consulted with Mr. Simpson on occasion about this case?

A. Yes, I have.

Q. And you and Mr. Simpson were at my offices, Porter, Wright, Morris & Arthur on September 28th of 1998 for Mr. Simpson's deposition?

A. Yes, I was.

Q. And that was pursuant to a Notice of Deposition that was served on you; is that right?

A. Yes.

Q. And on the morning of September 28th of 1998, when you came to my office, you first reviewed some documentation that you had asked to see?

A. Yes, I did.

Q. And that pertained to other employees of Columbus Southern Power who had been laid off at the same time as Mr. Simpson?

A. Yes.

Q. And you were interested in seeing documentation of other employees in the same job classification as Mr. Simpson that were laid off at the same time that he was; is that right?

A. Yes.

Q. And actually, you had requested that documentation in the course of some settlement discussions in this case, hadn't you?

A. Yes, I had.

Q. And then following your review of the documentation on September 28th and prior to getting Mr. Simpson's deposition, I renewed the company's settlement offer of $18,500 in full settlement of Mr. Simpson's claims?

A. Yes, that's what I recall.

Q. Okay. And that had been an offer that had been made at the settlement conference that had occurred a week or two before this; is that right?

A. Yes, that's true.

Q. And at that time then, you conferred with Mr. Simpson in one of our conference rooms at Porter, Wright?

A. Yes, I did.

Q. Okay. And after conferring with Mr. Simpson, you then met with myself and Bob Cohn of Columbus Southern Power and gave us a counteroffer of settlement; is that right?

A. Yes, I did.

Q. Okay. And that counteroffer of settlement is that Mr. Simpson wanted $21,500 in exchange for release of his claims?

A. Yes.

Q. Is that right?

A. Yes.

Q. And there was one contingency, that Mr. Simpson and you wanted confirmation as to the payroll records concerning an employee Paul Benson; is that right?

A. Yes.

Q. And there had been some question as to whether maybe Mr. Benson had received some type of severance

benefit at the time of his layoff and you wanted confirmation from payroll that he had not received that payment?

A. Yes. I wanted confirmation from the company.

Q. Okay. And you requested this confirmation, basically, because Mr. Simpson had a question as to whether Mr. Benson might have received some type of severance benefit that Mr. Simpson did not receive?

A. Yes, that's true.

Q. Okay. And it was agreed at our offices that morning that we would obtain payroll records concerning Mr. Benson and provide them to you; is that right?

A. Yes, yes.

Q. Also, that we would attempt to get Mr. Benson on the telephone and actually make him available so you could question him personally, right?

A. Right.

Q. And that was the only contingency to the demand of $21,500 in exchange for a release of his claims?

A. Yes.

Q. Okay. And shortly after you made that demand to us, I then approached you after conferring with Mr. Cohn and presented you with a counteroffer; is that correct?

A. Give me that question, again, please?

Q. Okay. You presented the demand of $21,500 to Mr. Cohn and myself; is that right?

A. Yes.

Q. And then I asked -

A. Along with the contingency.

Q. Along with the contingency concerning Mr. Benson?

A. Correct.

Q. And I then asked for a couple of minutes to talk to Mr. Cohn in private?

A. Yes.

Q. And then after a few minutes we called you back into the conference room where we were?

A. Yes.

Q. I indicated to you that the company would make a counteroffer to your demand and that the company would pay $20,000 in exchange for a full release of claims and also provide the confirmation that you sought as to Mr. Benson; is that right?

A. Yes, that's correct.

Q. At that time then, you met briefly with Mr. Simpson; is that correct?

A. Yes.

Q. And then he left our office and indicated that he wanted to discuss the offer, the company's counteroffer with his wife; is that right?

A. Yes, that's correct.

Q. Okay. And so, he left our office, and you also left our office and went back to your office, right?

A. I explained that to you before I left, what Mr. Simpson sought to do.

Q. Right. I am saying at that point in time he wanted to consider the counteroffer; is that right?

A. Right.

Q. And we indicated to you that we would obtain the payroll records and to try to track down Mr. Benson?

A. Yes. He wanted to leave to speak to his wife and in the meantime, then, you were going to get that information.

Q. Concerning Mr. Benson?

A. Right.

Q. So, we did not start his deposition at that time?

A. No, we did not.

Q. Later that morning, then, I did fax you Mr. Benson's payroll records for 1995?

A. Yes, you did.

MR. LAING: Okay. If the Deputy Clerk could hand the witness "A" please, Defendant Number A? For the record, Your Honor, Exhibit Number A is a three-page exhibit.

Q. Mr. Stepter, is Exhibit Number A the payroll records for Mr. Benson that I faxed to you on September 28th, the morning of September 28th of 1998?

A. Yes. This appears to be the same fax.

Q. Okay. That was faxed to you later in the morning after you had left our office on September 28th, correct?

A. That's correct.

Q. Okay. And I went over that payroll record with you and explained the pay codes to you?

A. Yes, you did.

Q. Okay. The payroll records contained, as. Exhibit Number A confirmed, that Mr. Benson had not received a severance benefit of a lump sum payment?

A. Correct.

Q. Okay. He had only received a layoff allowance that was provided for under the Collective Bargaining Agreement for all employees, correct?

A. Yes. That was my understanding after speaking with you.

Q. Okay. And at that point in time then, you indicated that you were still waiting to hear back from Mr. Simpson; is that correct?

A. Yes.

Q. I subsequently called you in the early afternoon, sometime around one o'clock p.m. on the 28th of September?

A. Yes, correct.

Q. And at that time you had still not heard back from Mr. Simpson; is that right?

A. No, I had not.

Q. And my statement to you was that if David was not interested in this settlement or couldn't decide, then we wanted to reconvene for his deposition at approximately 1:30?

A. That's correct.

Q. Okay. You then called Mr. Simpson; is that right?

A. Yes, I attempted to reach Mr. Simpson.

Q. Okay. Then you called me back around 1:15 or 1:20 on September 28th?

A. Correct.

Q. Okay. And informed me that Mr. Simpson had accepted the company's counteroffer of settlement; is that right?

A. Yes.

Q. I'm sorry. Is that right?

A. Yes. I think I cut you off.

Q. Is that an accurate statement by you, Mr. Stepter?

A. Yes.

Q. Mr. Simpson had authorized you to communicate his acceptance of the offer?

A. Yes.

Q. And the settlement was conditioned only upon your talking to Mr. Benson to confirm that he had not received a severance benefit from the company?

A. That's true.

Q. Okay. And a little later that day I called you with Mr. Benson on the line?

A. Yes.

Q. Okay. And you were able to ask him questions about his layoff and whether he received any type of benefits from the company in 1995?

A. Yes, I was.

Q. Okay. And Mr. Benson informed you that he had not received any payment from the company beyond his layoff allowance?

A. That's correct.

Q. And basically, the layoff allowance was his sick pay bank that was converted to a layoff allowance?

A. That was my general understanding.

Q. And he also told you that he had applied for unemployment compensation?

A. Yes. It was the unemployment compensation that was another question, yes.

Q. That amount was offset from his layoff allowance?

A. Correct.

Q. In fact, Mr. Benson indicated that he had informed Mr. Simpson of the same thing the day before when Mr. Simpson had called him?

A. He told me that he had spoken to Mr. Simpson and he did tell him that. I can't recall whether or not if it was the same day or before or contemporaneous to that conversation.

Q. He indicated that he had told Mr. Simpson the same thing, that he had not received anything but a layoff allowance?

A. That's correct.

Q. You had obtained the confirmation of Mr. Benson, which was the only contingency to the settlement?

A. Yes.

MR. LAING: If the Deputy Clerk could hand the witness Exhibit Number B, please?

Q. Mr. Stepter, is Exhibit B a copy of the letter that I faxed to you on September 28th of 1998?

A. Yes, it is.

Q. And this was faxed to you after our conversation with Mr. Benson, correct?

A. Correct.

Q. Okay. And this letter was received by you on September 28th?

A. Yes, it was.

Q. And it reflected the parties' agreement about settlement on September 28th of 1998?

A. Yes.

Q. And at that time you did not contact me to express any type of disagreement with the contents of that letter did you?

A. You mean exactly when I received it or earlier?

Q. At the time you received that letter?

A. Not at the exact time I received it, no, I did not.

Q. You thought the case had been settled at that time?

A. Yes, I did.

Q. And then subsequently, several days later, I faxed you a draft settlement agreement in this case; is that right?

A. I do recall that, yes.

MR. LAING: If you could, Deputy Clerk, could hand Exhibit Number C to the witness?

Q. Okay, Mr. Stepter. Exhibit C is a cover letter to a settlement agreement that I faxed to you on October 1st of 1998?

A. Yes, it is.

Q. Okay. And approximately the time you received this or shortly after, you indicated Mr. Simpson now wanted to reinstate to the company for purposes of receiving benefits; is that right?

A. I'm sorry. Explain that?

Q. Okay. Sometime, either at the time you received Exhibit Number C or shortly thereafter, you indicated to me that Mr. Simpson also wanted to reinstate to the company for purposes of receiving benefits from the company?

A. Yes, or some version of reinstatement so he could receive his benefits.

Q. And also, on October 1st you told me that Mr. Simpson was no longer interested in settlement of the case?

A. If that contingency was not met, he was no longer interested in it.

Q. In settlement? Okay. At that time I told you that the company would move to enforce the settlement that had been reached in the case several days before; is that right?

A. Yes.

Q. And that we would seek fees associated with that motion if we had to pursue that?

A. To be honest with you, I don't recall that part. You may have said that.

Q. Okay. And then do you recall me calling you again several days later, before we actually filed the motion to enforce settlement, and asking you one more time if Mr. Simpson would abide by the agreement reached on September 28 of 1998?

A. I do recall that, yes.

Q. And you indicated that he would not; is that right?

A. That's correct.

MR. LAING: Okay. And if you would hand Exhibit Number D to the witness, please?

Q. Mr. Stepter, Exhibit Number D is a copy of a request for admissions that was served by Columbus Southern Power on Mr. Simpson on October 9th of 1998; is that correct?

A. Yes.

Q. Okay. And Mr. Simpson has not responded to these, has he?

A. Not to my knowledge.

Q. Okay, okay.

MR. LAING: That's all of the questions that I have for Mr. Stepter, Your Honor.

THE COURT: All right. Do you wish to cross-examine this witness?

MR. CULBREATH: Yes, I would, Your Honor. If I may?

THE COURT: Come forward.

MR. CULBREATH: I will be brief, Your Honor.

CROSS EXAMINATION

BY MR. CULBREATH:

Q. Mr. Stepter?

A. Yes.

Q. My understanding is that -- may I furnish this letter to you so you can see this? I only have that one copy of it. Have you seen that letter before?

A. Let me have a second.

Q. Go ahead, sir.

MR. CULBREATH: I scribbled some words on there. I'm sorry.

Q. Have you seen that letter before?

A. I do recall at least the contents of this letter.

MR. LAING: Your Honor, before we proceed, is there any way I could see that letter?

MR. CULBREATH: Yes, I'm sorry. I'll show it to him.

Q. Okay. This letter, basically, is a letter that was written by Mr. *** Thomas who was the Compensation and Benefit Manager; am I correct? You have seen it?

A. Yes. I would have to look at it, yes.

Q. Is it not true, also, by this letter that it had already been determined that Mr. Simpson was eligible for his LTD benefits by this letter; am I correct?

A. At the time of that very letter, the date of that letter, that was my understanding that he had been approved benefits, yes.

Q. Okay. Now, one of the contingencies that Mr. Simpson is contending is the fact that he was willing to settle this case, and I guess there was not a meeting of the minds? He felt like the $20,000 was a settlement for his claim in Federal court here; am I correct?

A. I don't understand. Would you restate your question, please?

Q. The understanding was that the settlement for the $20,000, by Mr. Simpson's understanding, was not inclusive of his LTD benefits?

A. If I understand what you are asking me, at the time that I informed Mr. Laing that the settlement was approved, my understanding is that the $20,000 was the whole settlement.

Q. Okay. Well, was that -- was that Mr. Simpson's understanding of it? Did you relay that to Mr. Simpson?

A. Yes, I did relay that to Mr. Simpson.

Q. That his LTD benefits were to be included in the $20,000 settlement?

A. No.

Q. Was not to be included?

A. No. The $20,000 was to be a lump sum and it was supposedly dispositive of all claims, including the long-term and short-term disability benefits.

Q. But at that point in time, he already had this benefit claim, so why would he include this when he was already eligible for it?

A. You would have to ask Mr. Simpson that, sir.

Q. Is it not Mr. Simpson's contention that he did not -- let me rephrase that. Is the hitch -- or may I use the word -- the "little hitch" here in this settlement was the fact that Mr. Simpson's contention is that the LTD benefits were not to be inclusive in the settlement?

A. To be honest, counselor, I don't really understand what Mr. Simpson's position is. It has wavered several different times on several different occasions, and I only know that

at the time I spoke to Mr. Laing and conveyed our acceptance of a settlement offer, that I conveyed to Mr. Simpson that that was a lump sum and dispositive of all the claims.

Q. When was that relayed to Mr. Simpson?

A. It was that afternoon. He had left to go speak to his wife. I had relayed the settlement number to him. He stated that he wanted to go discuss it with his wife. She was at work, and he left. And I explained that to Mr. Laing, and he said, fine, and we waited for his call.

Q. This discussion about the settlement, was that ever done in the presence of Mr. Laing or was that done between just you and Mr. Simpson?

A. Myself and Mr. Simpson.

Q. So, your discussion -- so, Mr. Laing had no knowledge of what Mr. Simpson's viewpoint was on this settlement except through what you have told me; am I correct?

A. I believe that would be correct.

Q. Okay. So, there could be the fact that there might have been a misunderstanding between you and Mr. Simpson as to what the $20,000 settlement was for?

A. I didn't think that there was.

Q. Okay. Did you make a phone call to his wife that afternoon and talk to Mrs. Simpson and was upset with her?

A. It seems as though I recall a conversation with her. I don't recall if it was the same day or not. It might have been.

Q. Okay. And in the essence of the conversation, was it an erratic conversation with her, that you were upset with her about not taking the settlement?

A. No, not at all.

Q. Okay. Did you talk to her for about an hour?

A. I do recall speaking to Mrs. Simpson, but I don't recall when it was. It may have been that same afternoon, I don't really remember.

Q. But it was close to around this period of time when David had said that he would go talk to his wife that you had a conversation with his wife?

A. I don't recall that, sir, but I do remember a conversation actually with Ms. Simpson before the settlement conference where she had actually approved the $18,500. She had actually approved a lesser amount of the settlement.

Q. Did you have a conversation with her -- I am talking about a conversation with her about the settlement where she explicitly said to you that this was not me or my husband's understanding of the settlement and that they would not accept it?

A. I do not recall that.

Q. And that you were upset?

A. No, no.

Q. You don't remember any conversation like that?

A. I don't think it happened.

Q. Okay.

THE WITNESS: May I off the record? Your Honor, I meant to get a statement on the record that Mr. Simpson has, indeed, waived his attorney-client privilege. I have had discussions about our conversation without doing that on the record.

THE COURT: Has he waived his attorney-client privilege?

MR. CULBREATH: Yes. He has no problem with that. Yes, Your Honor.

Q. Yes. So, the only recollection or the only discussion of that acceptance was your -- let me rephrase that. Mr. Simpson never signed a settlement agreement; am I correct?

A. Yes, that's correct.

Q. Okay. And the day in which he left the deposition, which was -- which you never had? There was never a deposition, correct?

A. The deposition never began.

Q. So, when he left and you discussed the settlement offer with Mr. Simpson, that was done between you and Mr. Simpson out of the view of Mr. Laing?

A. Out of the presence of Mr. Laing.

Q. Out of the presence of Mr. Laing? And then he left to go discuss this settlement offer with his wife; am I correct?

A. That's what he told me he was going to do.

Q. But at that point in time he had not accepted the settlement offer, correct?

A. There was still a contingency that had to be met.

Q. Yeah, but he had not accepted it?

A. Well, Mr. Laing still had -

Q. My point is, there was not a meeting of the minds and it was not accepted at that point when he left?

A. All right. I don't mean to play legal niceties with you, counselor, but there was an offer with a contingency on the table. So, I don't know if he actually accepted until the contingency had been met, but I am not trying to make a conflict. You understand where I am coming from?

Q. It was not -

A. The deal wasn't closed.

Q. Okay. The deal wasn't closed? Okay. Now, there was a meeting or there was talk of at 1:15 that you had talked to -- at what point -- let me rephrase that. At what point in time after Mr. Simpson left did you relay to Mr. Laing that he had accepted the offer, even though he did not have -- he would not be eligible for his long-term disability, when did that occur?

MR. LAING: I will object to the form of the question, Your Honor.

THE COURT: Sustained.

Q. At what point in time did Mr. Simpson accept this settlement? I am speaking on the point when he had left and he was going to go discuss this with his wife?

A. I remember a telephone call by Mr. Simpson that I had after we had both left Mr. Laing's office, and he indicated that he had accepted the settlement, contingent upon confirmation of Mr. Benson's benefit status.

Q. And there was no discussion regarding his long-term disability?

A. Not at that time, no.

Q. when was that discussion made?

A. Later. I believe that it was later the same day after I had conveyed the acceptance, if you will, to Mr. Laing. Mr. Simpson later that day, I believe, called me later that day and he stated that he wondered if the settlement had -- I don't want to put words in his mouth -- but something regarding his long-term disability
benefits, whether or not would the settlement include that. I believe that was the gist of what he was asking me at that point in time.

Q. So, you are saying at some point or at some period of time the same day, Mr. Simpson had called you back, but you had already relayed that he had accepted the offer, is that what you are -- is that what you are telling the Court?

A. As I recall the sequence of events, Mr. Simpson called me somewhere between -- I don't know -- maybe one or 1:30.

Q. Okay. That would be the 1:15 call?

A. Yeah, yeah.

Q. All right.

A. And he stated that he accepted the offer, okay? I then called Mr. Laing and told him that the offer was accepted, contingent upon confirming the information about Mr. Benson.

And that, by the way, that's also what Mr. Simpson said, that we can work out the deal if we can confirm Benson. Benson was the big sticking point.

Q. You are telling this Court that his long-term disability benefits were not discussed and never was a contention in the settlement of this claim?

A. I am not sure that I understand your question. On the day of the settlement?

Q. Right.

A. Is that your question?

Q. You are talking about the date at 1:15 when he called?

A. Right, right.

Q. He never said anything to you about that?

A. No. That never come up at all, sir.

Q. When did that come out? Later on?

A. Later that same day, after I talked to Mr. Laing, we have -- I said, you know, we will take the $20,000 if we can confirm Benson's status.

Q. Do you know about what time that was, approximately?

A. I think that was 1:15. It sounds like the 1:15 call.

Q. So, Mr. Laing -

A. Yes.

Q. So, you are saying around 1:15 or so, you talk to Mr. Simpson -

THE COURT: I thought you said that you were going to be brief?

MR. CULBREATH: Your Honor, I only have one more question now.

A. I didn't have a chance to answer your last question. In any event, I did convey it Mr. Laing. Mr. Laing said, as I recall, he said he would make Mr. Benson available. I believe he had faxed the records to me by then, and I wanted speak to him personally. I wanted to make sure, you know, that what he is saying was what happened.

And later that afternoon, we did get Mr. Benson on a call, a conference call. I spoke to him and asked him several questions. And I was satisfied and that was it as far as I knew, and you know, I believe I conveyed that information to Mr. Simpson that I had confirmed with Mr. Benson personally that, you know, that he didn't receive any additional benefits.

And again, the details are a little fuzzy, but later that day I believe Mr. Simpson -- I believe he telephoned me and he said that -- he asked the question about the long-term disability, whether or not that was a part of the deal, and I told him, no, you know, that as I had explained before, the contingency had been Benson and the $20,000. And I believe it was at that point that he said, then, there is no deal or something along those lines.

MR. CULBREATH: Okay. Thank you, Your Honor.

THE COURT: Do you have any other questions?

MR. LAING: No. No further questions, Your Honor.

THE COURT: All right. Take your seat, please. Do you have any other testimony?

MR. LAING: No, Your Honor.

THE COURT: All right. Do you wish to put a witness on?

MR. CULBREATH: Yes, I do, Your Honor.

THE COURT: To put the plaintiff on the stand? Please be seated in the witness chair.

DAVID SIMPSON

Being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CULBREATH:

Q. State your name and address and so forth for the record?

A. My name is David Alan Simpson.

Q. Your address?

A. My address is 285 Cherrystone Drive North, Gahanna, Ohio, 43230.

Q. Mr. Simpson, I presume that you understand what is going on here and what we are involved with here. I will try to be brief here. Do you remember the date of the deposition that you had or were supposed to have taken at the office with Attorney Laing, Mr. Laing?

A. Yes.

Q. At the offices of Porter, Wright?

A. Yes.

Q. Okay. Do you remember settlement discussions?

A. Yes, I do.

Q. Okay. Can you briefly tell the Court what your understanding of the settlement offer was and how this come about?

A. Okay. May I go back the day before the 28th? I went to Attorney Stepter's office. He was briefing me for deposition. And at that time, he and I had discussed my sick

and accident pay. And Attorney Stepter advised me not to take the $18,500 that Attorney Laing was offering. And I advised him that the sick and accident pay had already been granted to me --

THE COURT: Don't speak into that. I can't hear you. Just speak in your natural tone without the assistance of that.

THE WITNESS: Yes, sir. Yes, sir. And he told me not to accept $18,000.

THE COURT: What?

THE WITNESS: He told me not to accept the $18,000 at his office on Saturday.

THE COURT: Well, let's get up to that. Go ahead.

Q. Well, we are talking about the settlement. Let's get up to what we are talking about.

A. I was fully aware --

THE COURT: No, no. I am not having a repetition step by step of what has been testified to.

Q. I want you to tell the Court, did you agree that you would accept $18,000 -- I mean $20,000 as full settlement on September 28th?

A. I told Attorney Stepter I wouldn't accept it if my sick and accident pay was not included.

Q. So, the contingency here to you was not Mr. Benson but the fact that you would not -- you would accept a settlement of $20,000 to settle your claim if it did not include your long-term disability benefits?

A. That's correct.

Q. And that was your understanding?

A. Yes, it was.

Q. Okay. Did you go -- when you left Mr. Laing's office, you went to go talk to your wife; is that correct?

A. That's correct.

Q. When was this discussion made about the long-term disability?

A. When I called Attorney Rayl Stepter back, I said, would that $20,000 include my sick and accident pay? He told me, no.

Q. Are you telling this Court that you were willing to accept the $20,000 as long as it did not include your long-term disability?

A. That's correct.

Q. And your attorney told you that it did not include that?

A. That's correct.

Q. At the point in time when you heard that, you decided that you did not want to accept this settlement?

A. That's correct.

Q. Did you know at that point in time that your attorney had agreed to settle for $20,000?

A. No, because I thought that he said that the settlement -- that my sick and accident pay was not included.

Q. So, that was the point here, whether or not the $20,000 included the sick and accident pay or not included it?

A. That's correct.

Q. And you were willing to accept the settlement as long as it did not include your sick and accident pay; am I correct?

A. That's correct.

Q. And your sick and accident pay, you had a letter here -

MR. CULBREATH: May I show this to him, Your Honor?

Q. That letter is dated February of '97?

A. That's correct.

Q. You had already been granted that sick and accident; am I correct?

MR. LAING: Objection, Your Honor.

THE COURT: What is the basis of your objection?

MR. LAING: I believe that letter was from several years prior, Your Honor, and I object to the characterization that it had already been granted by the company. That was one of the claims of this lawsuit. The company's position is he was not and is not entitled to that money.

THE COURT: Sustained.

THE WITNESS: I am entitled to this money because it concerns time, Judge, that you earn from years of service. And I had twenty plus years.

Q. Well, let's just say that for purposes of this hearing here, your understanding that the long-term disability, your LTD, was separate from the settlement and that's your understanding with your attorney?

A. That's correct.

Q. And that you would not accept and would not have signed the settlement agreement or settlement release because it did not -- because it did not include any mention or anything concerning your long-term disability?

A. That's correct.

Q. And that is why you refused to sign it?

A. Yes, sir, that's correct.

Q. Also, did you have a discussion that you said that you wanted to leave -- that Mr. Laing talked about -- as far as wanting to go talk to your wife when you left that office?

A. Yes, I did. And Attorney Rayl Stepter was supposed to call my wife prior to saying yes to Attorney

David Laing. And I don't think he called her until after he had said yes. So, neither one of us knew exactly what he and David Laing had discussed or what the terms were.

Q. Were you not there present during that discussion?

A. They was all meeting in an office, Attorney Rayl Stepter and Attorney David Laing and Attorney Cohn, about an hour and a half without my presence.

Q. You weren't present for any of that discussion?

A. No.

Q. The only way you knew anything about that discussion is what your attorney told you?

A. That's correct.

Q. So, there is a discrepancy between you and your attorney's understanding of what was said in that meeting, and what you got from your attorney is you would settle this for $20,000 excluding the long-term disability?

A. That's correct.

Q. Which was a total separate issue?

A. That's correct.

THE COURT: Do you have any questions of this witness, Mr. Laing?

MR. LAING: Yes, Your Honor, a couple of questions, I think, just to clarify.

THE COURT: All right.

CROSS EXAMINATION

BY MR. LAING:

Q. There have been questions, David, about LTD, long-term disability and sick and accident benefits; is that right?

A. Yes.

Q. But they are not the same thing, right?

A. Well, according to your book, they are all affiliated. I don't know how they are.

Q. But the letter that your attorney has shown you pertains to sick and accident benefits; is that right?

A. Because, see, sick and accident is paid by the employer.

Q. Okay. But let me ask you this, okay? The sick and accident benefit -- you are claiming that you are entitled to that, right?

A. Yes, I am.

Q. The company has taken the position in this case that you are not entitled to it, haven't they? That has been my response in this lawsuit; is that correct?

A. I guess.

Q. That's what I have told you, isn't it? That the company's position is that you are not entitled to that, right?

A. I don't recall you saying that to me.

Q. Okay.

A. That way. I don't know -- I don't know what you mean when you say that to me. Explain it in detail.

Q. Let me ask you one more question then. You are claiming that you are entitled to this sick and accident benefit; is that right?

A. That's correct.

Q. And that was about $16,000 or something, according to that letter?

A. Somewhere in that range.

Q. And the settlement in this case is a figure of $20,000, which exceeds what you claim is your sick and accident benefit that you are owed; is that correct?

A. The money that you offered, yes.

MR. LAING: Okay. No further questions, Your Honor.

THE COURT: Do you have any further questions?

MR. CULBREATH: Just for clarification. If I may clarify something?

THE COURT: Now, this will be based entirely on his questions?

MR. CULBREATH: Right, a clarification.

REDIRECT EXAMINATION

BY MR. CULBREATH:

Q. The $20,000 settlement that you were offered, did you know exactly what that $20,000 would be inclusive of?

A. No, I did not. I knew he said that that money, the sick and accident pay was not included in that amount.

Q. And you strictly thought it was settlement of the other part of your claim?

A. Yes.

Q. It had nothing to do with your sick and accident?

A. That's correct.

Q. That was explained to you that that would be later on negotiated?

A. Yes.

Q. That's why you didn't sign it?

A. That's why I didn't sign it.

MR. CULBREATH: Thank you, Your Honor.

THE COURT: Take your seat. Do you have any other testimony?

MR. CULBREATH: No, Your Honor.

THE COURT: Okay. You have no other testimony, Mr. Laing?

MR. LAING: No, Your Honor.

THE COURT: All right. The matter is submitted. The Court will come to a decision shortly.

The Clerk will adjourn court until nine o'clock tomorrow morning.

THE CLERK: All rise. Court stands adjourned until nine o'clock tomorrow morning.

CERTIFICATE

I, Georgina L. Wells, Registered Professional Reporter, Official Court Reporter, Holder of Certificate of Merit do hereby certify that the foregoing 38 pages constitute a true, correct and complete transcription of the settlement hearing in the above-entitled cause heard before the Honorable Joseph P. Kinneary, United States District Court, sitting at Columbus, Ohio, on Tuesday, November 17, 1998, and said proceedings having been written by me, electronically reproduced and transcribed by computerization and personally edited by me against my computerized stenographic notes.

"s/Georgina L. Wells"
GEORGINA L. WELLS, RPR,CM
Official Court Reporter

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF OHIO.

DAVID A. SIMPSON

v.

COLUMBUS SOUTHERN POWER
No. C-2-97-0938

FILED
KENNETH J. MURPHY
CLERK
98 NOV 24 AM 10:58
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EASTERN DIV
COLUMBUS

February 2, 1999

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that this case be DISMISSED. On September 28, 1998, the parties agreed to settle this case. The terms of the settlement agreement are contained in Defendant's Exhibit C offered by Defendant at the evidentiary hearing held on November 17, 1998. A copy of that settlement agreement is attached to this Judgment.

2-2-99
Date

KENNETH J. MURPHY
Clerk

"s/Wanda Harrison"
(By Deputy Clerk)

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE AND WAIVER OF ALL CLAIMS

This confidential Settlement Agreement and Release and Waiver of All Claims ("Agreement") is entered into by and between, and shall inure to the benefit of and be binding upon, the following parties:

DAVID A. SIMPSON, hereinafter collectively referred to, together with their heirs, executors, administrators, successors, assigns and other personal representatives, as "Mr. Simpson"; and

COLUMBUS SOUTHERN POWER COMPANY, hereinafter referred to, together with all its predecessors and past, present and future assigns, successors, affiliates, subsidiary organizations, divisions, and parent corporations -- including but not limited to American Electric Power Company, Inc. -- including all past, present and future officers, directors, shareholders, employees, and agents of the same, individually and in their respective representative capacities, as "Columbus Southern Power."

WITNESSETH:

WHEREAS, a dispute has arisen between Mr. Simpson and Columbus Southern Power concerning Mr. Simpson's employment with and termination from Columbus Southern Power, and concerning Mr. Simpson's entitlement to certain benefit payments; and

WHEREAS, on or about August 20, 1997, Mr. Simpson commenced Civil Action No. C2-97-938 against Columbus Southern Power in the United States District Court, Southern District of Ohio, Eastern Division, which

action contained allegations of employment discrimination, violations of the Employee Retirement Income Security Act ("ERISA"), and intentional infliction of emotional distress; and

WHEREAS, Mr. Simpson has amended his complaint on two occasions to expand his claims in Civil Action No. C2-97-938; and

WHEREAS, Columbus Southern Power at all times has denied the allegations set forth in the complaint and amended complaints in Civil Action No. C2-97-938 and has further denied any fault, wrongdoing, liability, injury or damages arising out of or related in any way to Mr. Simpson's employment with and/or separation from Columbus Southern Power; and

WHEREAS, the parties, in good faith, desire to compromise, settle and resolve their dispute regarding all of the foregoing, now and for all times, so as to avoid the costs and inconvenience of further litigation, and have reached in confidence this Agreement in settlement of all their differences and in substitution for all claims that Mr. Simpson has or may have against Columbus Southern Power (excluding only Mr. Simpson's pending workers' compensation action in the Franklin County, Ohio Common Pleas Court, being Case No. 97-CVD09-8298), either arising out of or related in any way to Mr. Simpson's employment with or separation from employment, including based upon any acts or omissions involving Columbus Southern Power; and

WHEREAS, the parties further agree that this Agreement adequately resolves any and all such differences and claims between them;

NOW, THEREFORE, in consideration of the promises, covenants and agreements set forth herein, it is hereby agreed as follows:

1. **Dismissal of Mr. Simpson's Civil Action With Prejudice**. Upon execution of this Agreement, Mr. Simpson hereby directs and authorizes his attorney of record to voluntarily dismiss, with prejudice, the aforementioned Civil Action No. C2-97-938. This dismissal with prejudice will include and forever preclude any and all claims which have been or could have been alleged in said civil action and/or based on any allegations set forth in such civil action, and will be a dismissal of such claims as to Columbus Southern Power, as defined in this Agreement and including but not limited to American Electric Power Company, Inc. In this regard, Mr. Simpson and Columbus Southern Power agree that, upon execution of this Agreement, they will file a Stipulation of Dismissal in Civil Action No. C2-97-938 in the form attached hereto as Exhibit A.

2. **Mr. Simpson's Release and Covenant Not to Sue.** In consideration of the payment recited in Paragraph 8 below, the adequacy of which is hereby expressly acknowledged, and all other consideration relating to the same, Mr. Simpson, as defined in this Agreement, hereby individually and collectively RELEASES AND FOREVER DISCHARGES Columbus Southern Power, as defined in this Agreement, of and from any and every action, cause of action, complaint, claim, demand, administrative charge, legal right, compensation, obligation, damages (including exemplary or punitive damages), liability, cost and/or expense (including attorney's fees), that he has, may have, or may be entitled to against Columbus Southern Power, whether individually or collectively, whether legal, equitable or administrative, whether known or unknown, which arise directly or indirectly out of, or are related in any way to, Mr.

Simpson's employment with or separation from Columbus Southern Power, and/or which are supported by any other reason, act, or omission, specified or unspecified, occurring or arising prior to the date of this Agreement, except that this Release and Covenant Not to Sue does not apply to Mr. Simpson's pending workers' compensation action (No. 97-CVD09-8298) or to any vested rights under Columbus Southern Powers pension plan. The parties intend this Release and Covenant Not to Sue to cover any and all such purported claims and rights, whether arising under any employment contract (express or implied), policies, procedures or practices of Columbus Southern Power, and/or by any actions or omissions of any of its agents or employees or former agents or employees, and/or whether arising under any state or federal statute including, but not limited to, Ohio's employment discrimination laws, all federal discrimination laws, including the Americans with Disabilities Act, all local laws and ordinances, and/or common law, without exception. As such, this Release and Covenant Not To Sue is intended as a general release. representing a full and complete disposition and satisfaction of all of Columbus Southern Power's real or alleged legal obligations to Mr. Simpson, with the above-noted exception of his pending workers' compensation action (No. 97-CVD09-8298) and any vested rights tinder Columbus Southern Powers pension plan.

3. **Confidentiality.** Mr. Simpson and his attorney, Rayl Stepter, agree to keep the existence and terms of this Agreement, and the settlement it embodies, strictly confidential, and further agree not to disclose or permit disclosure of any information concerning this Agreement to any other person, commercial or nonprofit entity, and/or any print, radio or television news media, including any commercial or nonprofit newspaper, publication or broadcast, of any kind whatsoever, except: (a) as required to do so by

law or court order; (b) as necessary for tax planning and/or preparation or to respond to inquiries or audits by a federal, state or local taxing authority; or (c) as provided for in paragraph 11 of this Agreement (during an action for breach of this Agreement). In addition, Mr. Simpson further agrees that if asked about the status or outcome of his civil action against Columbus Southern Power, he shall only state that the case has been resolved by mutual agreement and dismissed, but shall not disclose any dollar amounts or any other terms of this Agreement. Because it would be difficult, if not impossible, to calculate the actual monetary damages to Columbus Southern Power should a violation of this confidentiality provision occur, Mr. Simpson agrees that each such violation, if proved by a preponderance of the evidence during an action for breach of this Agreement, shall entitle Columbus Southern Power, in addition to any other legal and equitable relief to which it may be entitled, to liquidated damages in the amount of One Thousand Dollars ($1,000.00).

4. **Nondisclosure of Confidential and/or Privileged Matter.** Except as required by law or legal process -- and only then upon prior notice to opposing counsel, Mr. Simpson and his attorney agree not to divulge or disclose any documents deemed to be confidential and which they obtained or had access to in the course of Civil Action No. C2-97-939. Toward this end, before or upon execution of this Agreement, Mr. Simpson and his counsel agree to return to Columbus Southern Power's legal counsel any and all wage, salary or other information pertaining to other employees or former employees of Columbus Southern Power that was provided by Columbus Southern Power or its attorneys during the course of Civil Action No. C2-97-938.

5. **No Reinstatement of Employment or Re-Employment**. Mr. Simpson further expressly waives any

right or claim he may have for employment or re-employment with Columbus Southern Power, covenants that he will not seek any employment or re-employment with Columbus Southern Power or with any other company in the American Electric Power ("AEP") system, covenants not to bring any suit or claim against Columbus Southern Power or any other AEP system company should she seek to obtain employment with such in the future and be denied such employment, and agrees that this Agreement shall act as a complete bar to his entitlement to any legal, equitable or administrative relief, as described and defined in Paragraph 2 above, based upon any such denial of employment.

6. **No Claim for Attorney's Fees or Costs**. Mr. Simpson agrees that neither this Agreement nor any action taken hereunder shall be interpreted or construed to render him a prevailing party for any reason, including but not limited to, an award of attorney's fees or costs. and that no monies in addition to those referenced in Paragraph 8 below shall be payable to Mr. Simpson, or his attorney, for attorney's fees, costs or for any other reason.

7. **No Admission of Liability**. The parties agree that this Agreement is entered into solely because of a desire on the part of all concerned to amicably resolve all disputes between them and to avoid further litigation, and nothing contained herein, and no actions undertaken by Columbus Southern Power with respect to this Agreement shall ever be treated as, or claimed or construed to be, an admission by Columbus Southern Power (as defined in this Agreement) of any fault, wrongdoing, liability, injury or damages.

8. **Payment to Mr. Simpson and His Attorney**. Upon execution of this Agreement, Columbus Southern Power agrees to pay Twenty Thousand Dollars ($20,000.00) to Mr. Simpson and his attorney, Rayl Stepter, Esq. This

payment is for, and pertains solely to, alleged physical injuries incurred by Mr. Simpson relating to Mr. Simpson's employment with or separation from Columbus Southern Power, and for attorney's fees and costs incurred in connection with Mr. Stepter's legal representation of Mr. Simpson. This sum represents full and complete satisfaction and payment of any and all monies purportedly due and owing to Mr. Simpson and/or his attorney, arising out of or relating in any way to the allegations contained in Civil Action No. C2-97-938.

9. **Mr. Simpson's Responsibility for Tax and Social Security Liability**. Mr. Simpson acknowledges and agrees that he is solely responsible for any and all federal, state and local tax, FICA and/or social security liabilities and consequences which may result from his receipt of the payment referenced in Paragraph 8 above, and agrees to hold harmless and indemnify Columbus Southern Power, as defined in this Agreement, against any and all such liabilities or resulting consequences, including assessments, lawsuits, judgments, fines, interests, penalties, costs and reasonable attorney's fees. Mr. Simpson further agrees that Columbus Southern Power shall not be required to pay any further sums to Mr. Simpson for any reason even if the tax and/or social security liabilities and resulting consequences to them are ultimately assessed in a fashion which the parties do not presently anticipate.

10. **Consultation with Counsel.** Mr. Simpson and Columbus Southern Power agree and acknowledge that they have been given a reasonable period of time within which to consider this Agreement, have fully discussed the terms of this Agreement with their respective attorneys, and have fully reviewed with their attorneys the legal claims and rights which are being released and the obligations of each party under this Agreement. Based upon that review and

discussion with counsel, Mr. Simpson and Columbus Southern Power acknowledge that they fully and completely understand and accept the terms of this Agreement and enter-into it freely, voluntarily and of their own free will.

11. **Breach**. Mr. Simpson and Columbus Southern Power agree and acknowledge that this Agreement may be used as evidence in any subsequent proceeding, including an injunction action, in which either party alleges a breach of this Agreement or asserts claims inconsistent with its terms.

12. **Entire Agreement**. Mr. Simpson and Columbus Southern Power agree and acknowledge that this Agreement contains and comprises the entire agreement and understanding between the parties, that no other representation, promise, covenant or agreement of any kind whatsoever has been made to cause any party to execute this Agreement, and that all agreements and understandings between the parties are embodied and expressed herein. The parties further agree and acknowledge that the terms of this Agreement are contractual, and not a mere recital, and the parties intend this Agreement to be a substituted contract, not an executory accord. The parties also agree that the terms of this Agreement shall not be amended or changed except in writing and signed by Mr. Simpson and a duly-authorized agent of Columbus Southern Power. The parties to this Agreement further agree that this Agreement shall be binding on and inure to

COLUMBUS SOUTHERN POWER COMPANY

By: _____

Title: _____

Date: _____

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Before me, a Notary Public in and for said County and State, personally appeared the above-named Columbus Southern Power Company through _____, its _____, who acknowledged that he/she did sign the foregoing instrument for and on behalf of Columbus Southern Power, and that the same is the free act and deed of Columbus Southern Power, and the free act and deed of him/her as its agent.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ ,this _____ day of _____, 1998.

_____
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF OHIO.
EASTERN DIVISION.

DAVID A. SIMPSON,
Plaintiff,

v.

COLUMBUS SOUTHERN POWER CO.,
Defendant.
No. C2-97-938

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a),. Federal Rules of Civil Procedure, the parties, through their undersigned counsel, hereby stipulate that above-mentioned matter is dismissed in its entirety and with prejudice, each party to bear its costs.

Rayl Stepter (0047505)	David A. Laing (0023128)
Stepter Law Office	Porter, Wright, Morris & Arthur
111 W. Rich St., Suite 430	41 S. High St.
Columbus, OH 43215-4546	Columbus, OH 43215
(614) 463-9790	(614) 227-2208
Trial Attorney for Plaintiff David A. Simpson	Trial Attorney for Defendant Columbus Southern Power Co.